

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

ELYSIAN BREWING CO. Employer and IUOE LOCAL 286 Petitioner	Case 19-RC-082934
---	--------------------------

**EMPLOYER'S BRIEF IN SUPPORT OF EMPLOYER'S EXCEPTIONS TO HEARING
OFFICER'S REPORT AND RECOMMENDATION ON CHALLENGED BALLOT**

**I. SUMMARY: WHAT THE HEARING OFFICER GOT RIGHT
AND WHERE HE WENT WRONG**

The Hearing Officer's Report correctly determines that Bill Fairbanks' duties, when he is not doing production work, constitute "maintenance mechanic" work within the meaning of the bargaining unit definition. Where the Report went wrong is concluding that Fairbanks spends only 13 percent of his time doing such work. Sources of this error include: (1) the Hearing Officer treated examples given by Mr. Fairbanks of "ad hoc" maintenance work he performs as though that's the only maintenance work (other than preventive lubing) he has done and the time spent on those examples is the sum total of such work; (2) in reaching this conclusion, the Report ignores generic testimony from Fairbanks—the best witness of what his duties are—that he does "ad hoc" maintenance as assigned every day by the supervisor of maintenance mechanics; and (3) it ignores the consistent testimony by Mr. Fairbanks that about 30 percent of his time is spent doing maintenance, consisting of daily preventive maintenance work—

which the Hearing Officer's Report acknowledges—plus daily ad hoc maintenance work as assigned. (4) Also contributing to the Report's math error is a misapprehension of Mr. Fairbanks' testimony as to the amount of time he spends "cleaning up" the area before the end of his shift.

Exceptions filed herewith identify these math errors, and take issue with placing the burden of proof on the Employer. The Hearing Officer's conclusion that Bill Fairbanks is not an eligible voter because he does too little "maintenance mechanic" work to qualify as a dual-function employee, is in error, and his Recommendation that the challenge to his ballot be sustained and that the Regional Director certify the Operating Engineers Local 286 as bargaining representative should not be followed.

**II. BILL FAIRBANKS' MAINTENANCE WORK IS AT LEAST
25 TO 30 PERCENT OF HIS JOB. THIS QUALIFIES HIM AS A
"DUAL-FUNCTION EMPLOYEE" ENTITLED TO VOTE.**

Mr. Fairbanks generally works the second shift, arriving between 1 and 2 p.m. and leaving at or around 10 p.m. The first part of his shift, he works on the bottling line, which finishes up around 3:30. Tr. 82:16-18. After that, although he does other things too, he works at maintaining and trouble-shooting the machines until he goes home. In that part of his job, he takes direction from the salaried maintenance mechanic who was excluded as a "supervisor" from voting (Tr. 61:17-21), as does the other part-time mechanic, who did vote in the election and was not challenged.

Mr. Fairbanks himself estimates he spends "30 percent or more" of his time as a maintenance mechanic at the brewery. Tr. 65:9-12; 104:2-13. Joe Bisacca, the CEO of Elysian Brewing who has been directly involved in the construction and staffing of the new brewery, views Mr. Fairbanks' split as essentially half-and-half, although he concedes Mr. Fairbanks would be a better judge of the split. Tr. 20:3-13. Working at

least 25 percent of his time as a maintenance mechanic, Mr. Fairbanks would qualify as a dual-function employee entitled to vote. *Medlar Electric, Inc.*, 337 NLRB 796 (2003) (25 to 30 percent is sufficient); *WLVI, Inc.*, 349 NLRB 683 n.5 (2007) (25 percent suggested as a guideline); *AVCO Corp.*, 308 NLRB 1045, 1047 (1992) (employee spending 25-50 percent of her time doing unit work was eligible).

Mr. Fairbanks emphasized (multiple times in his testimony) the difficulty in identifying each job assignment he performed and in stating how long it took on a “typical day,” because of variations in what he does and when he does them. There are days—maybe one out of five—that he works a day shift, when he estimates the split of his work is 75/25 between his “day job” on the bottling line and his night job doing some maintenance and repair. Tr. 100:14 – 101:22. There are also days when he has done no bottling work during the day—the bottling line is not operating—so what he does on those days is the maintenance work he typically would do on a night shift. Tr. 155:23 – 157:9.

Mr. Fairbanks works an eight-hour shift (excluding a half-hour lunch break and the equivalent of two 15-minute breaks). Tr. 104:17 – 105:17. He typically starts at about 1:30 p.m., and typically the bottling line shuts down at about 3:30. Tr. 82:16-19. From then until maybe 7:30, but generally not that late, Tr. 91:17 – 92:7, he engages in cleanup, moves beer to the cooler with the forklift, and makes boxes. After 7:30, until his shift ends at 10:00, he is able to perform the ad hoc maintenance assignments left for him by the maintenance supervisor, except for time he spends cleaning up at the end of the shift. Tr. 61:17 – 65:12; 91:17 – 96:25.¹ Over the course of the night, he

¹ The testimony is not completely clear, in a cold transcript. But Fairbanks was estimating two hours of maintenance per night, one for “greasing” alone. “Q: Okay. And I know that you’ve testified to this earlier, but just

may spend a half hour running the “Zamboni” cleaning the floor, Tr. 99:17-19, including 15 to 20 minutes at the end of his shift, when he operates the Zamboni and two co-workers do the other cleaning. Tr. 98:5-11.

Because he is “multi-tasking,” Tr. 92:17 – 93:10, and sometimes does maintenance work during the day before 7:30 p.m., the following calculation probably errs on the side of understating the percentage of his time spent on “maintenance and repair”—which he continued to estimate at 30 percent throughout his testimony. Tr. 104:2-13. Here’s the calculation. Backing out his breaks (by law his half-hour lunch break and at least one-half of his two rest breaks must occur before the fifth hour of work (WAC 296-126-092(2) and (4)), this means at least two out of eight hours of work (from 7:30 to 10:00 less one-half hour cleaning with the Zamboni) are maintenance and repair activities. This would be 25 percent. When considering the multi-tasking nature of what he does after the bottling line shuts down, and the other qualifications as to what is a “typical” day, this calculation basically confirms his estimate that 30 percent of his time is spent doing maintenance and repair work.

refresh my memory, how many hours a night do you think you spend greasing? A: Probably two. Q: Two? A: Typically, two or between, well, probably an hour greasing.”

**III. THE HEARING OFFICER'S REPORT DOES NOT CORRECTLY
CALCULATE THE AMOUNT OF TIME BILL FAIRBANKS
PERFORMS MAINTENANCE MECHANIC WORK.**

A. The Hearing Officer's Calculation That "Fairbanks Spends About 45 Minutes Operating a Floor Zamboni Cleaning the Floors in the Production Area and Then Assists Two Other Production Employees in Cleaning up the Keg Washing Area Before Clocking Out" Misstates the Testimony.

Here's the testimony Bill Fairbanks actually gave, in response to questioning by the Hearing Examiner, about the cleaning and his operation of the Zamboni floor cleaner at the end of the shift:

Q Are there any cleaning tasks that you accomplished right at the end?

A Yeah, we clean, at the end, well, if we're not cleaning all during the night, around the keg washing station we clean that all up every night, the three of us, Nigel and August, they're cleaning inside the keg washing area and I'm zamboning on the outside.

Q Zamboning the floors of the whole production area?

A No, typically we'll do, we'll do that in sections also, but where the keg washing is . . . it is pretty dirty.

Q Right.

A So we clean that every night also.

Q How long does that take?

A Fifteen minutes, twenty minutes.

...
A And that's just for that spot there, but you know, typically, like I said, we'll try and get certain areas of that during the course of the night or, you know, so that we don't have everything to get at once. It's a pretty good machine.

Q Oh, so you, over the course of the night, you are responsible for cleaning the whole facility?

A In the packaging part, yes.

Q Okay. And total, how long does that take?

...
A Oh, probably, 45 minutes, 50 minutes.

Q Okay. Operating the Zamboni?

A Yeah.

...
A And that's not just me though, I'm mean, you know that's Nigel and August also. They'll get their one area, I'll, a lot of times, I'll get the area by the filler in the row that goes by depalletizer.

Q So if you had to, on a typical night, how many minutes would you personally operate the Zamboni?

A Maybe a half hour.

Hearing Transcript 98:5 – 99:19.

What Fairbanks is saying, is that all three of them do clean-up work at the end of the day; what he does is operate the Zamboni. Over the course of the entire shift, on average Fairbanks estimates he operates the Zamboni about a half hour, which includes the 15 to 20 minutes at the end of the day.

But what the Report concludes is that Fairbanks spends about 45 minutes operating the Zamboni in the production area, and then assists the other two employees in cleaning up the keg washing area. In its criticism of the Employer's math on this point, page 7, second paragraph, the Report states that Fairbanks most often completed his production-related duties at 7:30—whereas, his production work is often completed before 7:30 (Tr. 102:23 – 103:2)—and criticizes the Employer's calculation as failing “to take into account the end of night cleaning and Zamboni driving that Fairbanks testified to performing at the end of his shift.” This is not an accurate criticism. In fact, if it erred, the Employer's calculations at footnote 3 of the Employer's Post-Hearing Brief overstated the amount of cleaning done by Fairbanks after 7:30,

because the calculation made the assumption that the full 30 minutes of Fairbanks' Zamboni operating occurred during the end-of-day cleaning (which actually, according to the testimony of Fairbanks, took only 15 to 20 minutes of the half hour on average he spends operating the Zamboni cleaning the floors during his shift).

B. Much More Significant Is the Hearing Officer's Misinterpretation of Fairbanks' Testimony Report (fn.11) to Mean That He Spends Only Four-Tenths of One Percent of His Shift (Two Minutes a Day) Doing "Ad Hoc" Maintenance Work Assigned by the Maintenance Supervisor.

In answering the Hearing Officer's questions, Fairbanks testified, and there is no contradiction, that he performs ad hoc maintenance work, as assigned by the maintenance supervisor, every night, Tr. 95:20 – 96:9, and gave "examples" of "some of the tasks" that are left for him to accomplish at night:

Q . . . And you had previously testified that Jason, on occasion, had left you a list of tasks to accomplish when he leaves at six?

A Yeah, oh, not so much a list, he'll just tell me what he would like, what he would like to have done when he gets, you know, in the morning.

Q And is that something that he does every night?

A He'll tell me, yeah.

Q So you meet with Jason every night before he leaves?

A Well, actually I talk to him, all, you know, I'm constantly going to him during the day, you know, myself.

Q Okay.

A I mean, he leaves at different times, but he's real close to where I'm at, you know, he knows a lot, he's a good resource.

Q And then what is an example of some of the tasks that he leaves for you to accomplish at night after he leaves?

A Well he's, just Friday, he wanted me to check the water levels on the forklifts and on one of them, the battery is like 1,500 pounds, so, you

know, that, he'll remind me which machine needs lubing that day or that night.

Q Okay.

A He'll tell me that, he's told me, it's kind of hard, drawing a blank right now, but whatever –

Q You have gone through an example of some specific maintenance tasks, like fixing the floor Zamboni and repairing the fan belt and the cylinder on the forklift. . . .

Hearing Transcript 95:20 – 96:21 (emphasis added).

Fairbanks was giving some examples; but the Hearing Officer's math error, which was decisive, treats these examples as if they are the only maintenance jobs he performed over a 14-week period! Report p. 7 fn.11. This is a crucial misinterpretation of Fairbanks' testimony.

Fairbanks testified he was “drawing a blank,” and gave what are only examples. But his testimony that in total, his maintenance work (including preventive maintenance work plus “ad hoc” maintenance work) amounted to 30 percent of his job, was never shaken. He continued to estimate that 30 percent of his time is doing preventive maintenance and “ad hoc” maintenance tasks, done to some extent during the day but primarily at night after the maintenance supervisor and the other maintenance employee had gone home, leaving for him things they didn't get to during the day, to accomplish before the next day. Tr. 104:2-13.

Thirty percent of his eight-hour shift is a little less than two and one-half hours a day (144 minutes to be precise). Sixty minutes of that is, by the witness's estimate, doing daily preventive maintenance (lubricating machines and equipment, primarily). That leaves 84 minutes—a little less than an hour and a half—that the witness

estimates he spends on other ad hoc maintenance. The Hearing Officer's Report, however—because it treats the examples the witness gave as the sum total of what he did over a long period of time—concludes that he performed ad hoc maintenance tasks on his own or left for him by his supervisor—every single night—as amounting on average to only four-tenths of one percent of his eight-hour shift—which means two minutes. Fairbanks testified he is generally through with any other work at least by 7:30, if not earlier; that leaves two and one-half hours until the end of his shift at 10:00. Fifteen to twenty minutes he is operating the Zamboni—his part in cleaning up. That leaves more than two hours. If not his assigned maintenance tasks, what else is he doing during that two hours? Two hours a day is 25 percent, which is enough under the cases.

Granted, an hour-and-a-half a day doing ad hoc maintenance tasks is only the witness's estimate. His testimony describes a fluid shift where you "multi-task," and he doesn't consult a stopwatch as he moves from one task to another. But can he really be so far off as to estimate he spends an hour-and-a-half a day doing ad hoc maintenance and repair work on the machinery and equipment, when in fact he's only spending two minutes a day? He may not know precisely whether he's spending an hour a day on average, or an hour-and-a-quarter, or an hour-and-a-half . . . but could he be so far off that he's actually only spending two minutes a day? What possible maintenance and repair jobs—on a list left by the maintenance supervisor of tasks they couldn't get done during the day or done by Fairbanks on his own—can take only two minutes? How is it possible that Fairbanks performed maintenance other than daily lubing only three to four times between May and August 6, as the Hearing Officer

concludes, when he gets daily assignments of maintenance tasks to accomplish at night?

IV. MOTION TO REOPEN THE RECORD

Unless the Hearing Officer is concluding that Fairbanks is just lying, to please his boss or keep out the union he voted against—and nothing in the Report indicates that is what the Hearing Officer found and it is hard to believe such a finding could have been made—then it's a question of misinterpreting his testimony. If the testimony as it stands is insufficient to clarify that Fairbanks works at least 25 percent of his job doing maintenance—and probably more—then the Employer respectfully requests that the record be opened to call Mr. Fairbanks to clarify his testimony. Herewith, we are submitting a Declaration from Mr. Fairbanks setting forth the gist of what we would offer to prove.

V. THE HEARING OFFICER'S REPORT ERRONEOUSLY PLACED THE BURDEN OF PROOF ON THE EMPLOYER, TO JUSTIFY INCLUDING MR. FAIRBANKS. RATHER, THE BURDEN BELONGS ON THE UNION AS THE CHALLENGER TO SHOW THAT MR. FAIRBANKS IS NOT AN ELIGIBLE VOTER, AND THAT BURDEN HAS NOT BEEN MET.

Relying on *Harold J. Becker Co., Inc.*, 343 NLRB 51 (2004), the Hearing Examiner concluded that it was the Employer's burden to establish Fairbanks was eligible to vote. This was error. The party seeking to exclude an individual from voting has the burden of establishing that the person is in fact ineligible, as explained by Chairman Battista, dissenting in *Becker*.

True, the two-member majority in *Becker* placed the burden on the employer, in that case, to establish that the challenged workers were dual-function employees entitled to vote. Even so, their reasoning is distinguishable from the situation at hand.

Central to the *Becker* majority's analysis is their distinguishing of cases, including those cited by the dissent, which, as in this case, involved evidence that went directly to work performed by the individual employee whose status was in question. The problem in *Becker*, according to its majority, was that the employer did not provide estimates of the amount of time the disputed employees themselves spent performing unit work. Instead, the employer opted to provide evidence of how much unit work was being done at the jobsites, rather than worker-specific evidence establishing the amount of that unit work which was actually being performed by the individual employees in question. And that is why the two-member majority was "unable to conclude that they regularly performed duties similar to those performed by unit employees for sufficient periods of time The problem is that this calculation fails to take account the fact that other crewmembers at a site may have been doing the sheet metal work (unit work) at any given time, while the disputed employees, who also did roofing and waterproofing work, may have been performing other types of work." *Becker* at **2.

That is not the situation in this case. The testimony by Mr. Fairbanks himself, and that of CEO Joe Bisacca, who was personally involved in the building and staffing of the new brewery in Georgetown, address directly the work being performed by the employee in dispute—Mr. Fairbanks. *Becker* does not apply here. Instead, the general rule that the burden of proof is on the challenger, is what applies here. And consistent with the cases cited by the *Becker* dissent (which were distinguished by the *Becker* majority), the evidence is sufficient to warrant including Mr. Fairbanks.

**VI. EXCLUDING BILL FAIRBANKS, WHO PERFORMS MAINTENANCE
WORK AS A SIGNIFICANT PART OF HIS DAY, AND AT
THE SAME TIME INCLUDING THE TWO BOILER OPERATORS,
WHO ARE ONLY "TEMPORARY EMPLOYEES," WOULD RESULT IN
CERTIFYING A UNION CHOSEN ONLY BY TEMPORARY EMPLOYEES
WHO SHOULD HAVE BEEN EXCLUDED.**

Chairman Battista in *Becker* complained that exclusion of the dual-function employees in that case, because their jobs were in transition to full-time unit work, resulted in disenfranchising the very people who should have a voice in choosing representation:

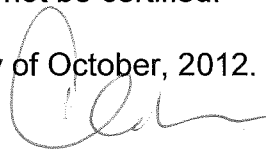
These are the employees who will in fact be represented if the Union is chosen, and thus these are the employees who should have a voice in deciding whether to choose representation.

In a different way, the same principle is involved in the situation at hand. The vote in this case is two-to-two. The two employees who want a union, the boiler operators, are workers who were hired on a temporary basis: they were hired only until the Employer's brewers get "up-to-snuff" and get their boiler operators' licenses. Contrary to the Union's skepticism voiced at an earlier stage in this representation proceeding, the Employer's plans for licensing the brewers have proceeded rapidly (as planned from the beginning), and four of the brewers have in fact now received their boiler operators' licenses. Declaration of Joe Bisacca, filed herewith. The two temporary boiler operators positions will be eliminated, and along with them, the two incumbents of the jobs. That would leave, to be represented by the Union, only the maintenance worker who voted against union representation, if Bill Fairbanks, who also does significant maintenance work, does not get his vote counted. That's just wrong!

VII. CONCLUSION

Bill Fairbanks is a dual-function employee properly included in the unit and an eligible voter. The Hearing Officer's conclusion to the contrary is in error and his Recommendation that the challenge to Fairbanks' ballot be sustained should not be followed. As a consequence, the election is a dead heat at two votes for and two votes against union representation, and the Union should not be certified.

RESPECTFULLY SUBMITTED this 23rd day of October, 2012.



Clemens H. Barnes
GRAHAM & DUNN PC
Pier 70, 2801 Alaskan Way Ste 300
Seattle, WA 98121-1128
(206) 340-9681 (Barnes)
cbarnes@grahamdunn.com
*Attorney for the Employer,
Elysian Brewing Co.*

CERTIFICATE OF SERVICE

The undersigned certifies that he filed the foregoing **Employer's Brief in Support of Employer's Exceptions to Hearing Officer's Report and Recommendation on Challenged Ballot** electronically with the NLRB, and emailed and sent by U.S. Mail a true and correct copy to:.

Jeff Frazier
IUOE, Local 286
18 "E" Street SW
Auburn, WA 98001
jeff.frazier@iuoe286.org

I declare under penalty of perjury under the laws of the United States of America and the state of Washington that the foregoing is true and correct.

Signed at Seattle, Washington this 23rd day of October, 2012.

Respectfully submitted,

s/Clemens H. Barnes
GRAHAM & DUNN PC
Pier 70, 2801 Alaskan Way Ste 300
Seattle, WA 98121-1128
(206) 340-9681 (Barnes)
(206) 340-9599 fax
cbarnes@grahamdunn.com
Attorneys for Employer